COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016140-96**

Albert Mark Gajda Employee
Specialty Minerals, Inc. Employer
Insurance Company State of Pennsylvania Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Levine)

APPEARANCES
J. Norman O'Connor, Esq., for the employee at hearing
Michelle K. Manners, Esq., for the employee on appeal
Paul Fisher, Esq., for the insurer at hearing
William C. Harpin, Esq., for the insurer on appeal
David G. Shay, Esq., for the insurer on appeal

MAZE-ROTHSTEIN, J. The insurer appeals a G. L. c. 152, § 30, medical benefits decision ordering it to pay for an MRI, a doctor's office visit and pain medications. The insurer argues first that the judge failed to base his award on any medical evidence; and second, that the only medical evidence -- the § 11A physician's report -- contains no opinion on whether such medical services were reasonable and necessary and/or causally related to the 1996 work injury. As a result, the insurer contends, the employee has failed to meet his burden of proof. We agree in part with the insurer and recommit the case for further findings on causation.

Albert Gajda, forty-eight years old at the time of hearing, has had several unfortunate back injuries and three even more unfortunate back surgeries. The first injury in the 1980's, was not work-related, and the second and third, in 1993 and 1996, respectively, were caused by his work activities. The judge found in his decision that the employee had two surgeries following the first non-work-related injury, and a third surgery followed the

1993 work-related injury.[1] (Dec. 2.) Though the judge made scant findings on the employee's work history, the employee testified that, at the time of his second injury in 1998-3, he was working as an electrician for Pfizer. Specialty Minerals, the employer here, took over Pfizer at some point, and the employee returned to work at a desk job after his 1993 surgery. He was eventually transferred to a heavier job as maintenance scheduler, which aggravated his back. (Tr. 9-13.)

Mr. Gajda settled his claim for the 1996 work injury in 1997, with an acceptance of liability by the insurer.[2] (Dec. 2; July 13, 1997 lump sum settlement agreement with Specialty Minerals, Inc., insured by Insurance Company State of Pennsylvania, of which the administrative judge took judicial notice.) By that time, the employee had returned to work as a bus driver with a new employer, where he worked for almost two years. (Dec. 2.) At hearing, he reported that driving increased his pain symptoms, as did activity in general.

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[1] The employee's testimony was somewhat at odds with the judge's findings regarding the timing of the surgeries. The employee testified that he had one surgery after each of his three injuries. (Tr. 9-13.) The § 11A physician's report has yet a third history. Dr. Aliotta stated that the employee "had a series of back injuries in the late 1980's and early 1990's. He had 3 surgeries prior to 1993." (Statutory Exh. 1.) These discrepancies might have provided a basis for a motion for inadequacy or for an argument that crucial findings were made without evidentiary support. However, neither party challenged the adequacy or admissibility of the § 11A report, so it retains its full probative value. Taylor v. Morton Hosp. & Med. Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30, 34-35 (2002), citing Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988), and P.J. Liacos, Massachusetts Evidence § 3.8 at 78 (7th ed. 1999). Similarly, neither party alleged that the judge's findings as to a crucial piece of history were unsupported by the evidence. See McCarty v. Wilkinson & Co., 16 Mass. Workers' Comp. Rep. 307, 309 (2002)(findings are arbitrary and capricious if not based on the evidence). We thus consider these issues waived and will not address them. See Schmidt v. Nauset Marine, Inc., 17 Mass. Workers' Comp. Rep. 326, 331 (2003); Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001); Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204, 207 (2001). See also 452 Code Mass. Regs. § 1.15(4)(a)3("[t]he Reviewing Board need not decide questions or issues not argued in the brief").

[2] At the same time, he settled his claim for the 1993 injury, also with liability accepted. (See July 13, 1997 lump sum with Pfizer, Inc., insured by American Policyholders.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) (reviewing board may take judicial notice of documents contained in the board file).

However, with rest and time, his pain would subside to a baseline level. He testified that there was no particular incident or task stemming from his job as a bus driver, that aggravated his back, though sometimes prolonged sitting was uncomfortable and would cause pain down his leg. (Dec. 2-3.)

As a result of his increased pain, in 2000, the employee saw his doctor, who prescribed some pain medications and an MRI diagnostic imaging test. The employee's claim for these medical expenses was denied at a § 10A conference, and he appealed to a de novo hearing on the issue of whether the medical services at issue where reasonable, necessary and related to the 1996 work injury.[3] (Dec. 2.)

The employee was examined by a doctor pursuant to § 11A. (Dec. 1; Statutory Exh. 1.) After hearing, the judge made the following findings:

> Mr. Gadja [sic] has undergone multiple back surgeries, resulting in continuing back pain for him, made worse by activity. Even his light job as a bus driver increased the level of pain he felt, and he finally underwent an MRI to see if there was something more that could be discovered. This would appear to be perfectly reasonable for a man who had undergone this many surgeries and, after working with the pain for a few years, continued to experience significant symptoms.
>
> The insurer also argues that a successive insurer, the bus company's insurer, should bear the responsibility for the diagnostic tests. But the employee plainly states there was no further incident or injury, and his report to the impartial physician suggests that the type of increased activity in driving that brought on increased pain (prolonged sitting, which he testified was up to three hours) is a type of activity which would not bring liability on a successive insurer, absent evidence of ergonomically suspect factors. See Zerofski's Case, 385 Mass. 590 (1982), Nee v. Boston Medical Center, 16 Mass. Workers' Comp. Rep. 265, 267-268 (2002). I find no such suspect factors based on the evidence presented. Rather, this appears to be a simple case of Mr. Gadja [sic] having a sore back from any sitting, as suggested by the impartial, who suggests Mr. Gajda's restrictions should include a prohibition against sitting for long periods of time. (See Stat. Ex. #1, p. 3).

[3] At hearing, the employee's attorney revealed that the employee had initially filed a claim against the insurer of Dufour, the bus company for whom he worked. That claim was denied at conference, and the employee appealed to a de novo hearing. Following a § 11A medical examination, the employee settled that case by way of a non-liability lump sum agreement in April 2002. (Tr. 6; lump sum agreement approved April 2, 2002 with Dufour Escorted Tours, insured by American Economy/Safeco.)

(Dec. 3.) The judge then ordered the insurer to pay for the medical services at issue, including the MRI.

The insurer appeals, arguing first that the judge failed to rely on any medical evidence, and second that the only medical evidence of record does not support a finding that the medical services in question were causally related or reasonable and necessary. We agree that the judge failed to specifically adopt the § 11A report, and therefore we cannot tell whether it factored into his causal relationship determination. We disagree that the report, as a matter of law, could not support a finding of liability against the insurer. However, since the report is susceptible to more than one interpretation, the judge must make further subsidiary findings to support his conclusions.

An insurer has an affirmative duty to "furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incident to such services . . . ." G. L. c. 152, § 30. See Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76, 77 (1996). Even where, as here, an insurer has accepted liability for an injury, it may challenge the reasonableness and necessity of medical services, and ongoing causal relationship to the original injury for which it is liable. See Reynolds v. Kay Bee Toys, 16 Mass. Workers' Comp. Rep. 433, 436 (2002). The employee, of course, has the burden of proving both causal relationship and the reasonableness and necessity of the claimed medical services. See Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185 (2003), citing Sponatski's Case, 220 Mass. 526 (1915). Because the issue of causation in successive insurer cases is generally a complex matter, it usually requires expert testimony. Guilbeault v. Teledyne Rodney Metals, 15 Mass. Workers' Comp. Rep 23, 27 (2001); Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112 (1999).

Here, the only medical evidence was the § 11A physician's report, which thus had prima facie effect. Neither party moved to submit additional medical evidence, nor did the

judge sua sponte request that the parties submit such evidence.[4] Despite these facts, the judge did not discuss the § 11A opinion or clearly adopt it in his decision. The only references he made to the § 11A report were that the employee's statement to the physician "suggests" that his activity driving a bus would not place liability on a successive insurer, and that Mr. Gajda has a sore back from sitting, "as suggested by the impartial, who suggests Mr. Gajda's restrictions should include a prohibition against sitting for long periods of time." (Dec. 3.) These oblique references to the impartial report are insufficient to indicate that the judge has adopted an opinion on causal relationship.

The failure to specifically reference and adopt the impartial report on causation is particularly troublesome where, as here, the § 11A report could be interpreted in more than one way. As the insurer points out, it is not clear from the § 11A report whether the doctor believed that the employee's work until March 1996 aggravated his 1993 injury and contributed to his current medical condition, or not. The history the doctor took indicates that the employee "had a series of back injuries in the late 1980's and *early 1990's*. He had three surgeries prior to 1993. He was working at . . . Specialty Minerals Inc, but was unable to continue his employment there due to persistent difficulties, particularly with the demands of the position in the stockroom. He last worked there in March 1996." (Stat. Exh. 1, p. 1; emphasis added.) The physician then concluded that "his diagnosis (of recurrent disc herniations with laminectomies and spondylolisthesis) was the culmination of the injuries sustained . . . from the 1980's through the *early* 1990's." (Id. at 3; emphasis added.)

Because of the § 11A report's ambiguity, we do not agree with the insurer, that the judge could not have based his causal relationship finding on the doctor's opinion. An ambiguous expert opinion on causation may be strengthened not only by expert medical

[4] General Laws c. 152, § 11A, gives medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

testimony, but also by lay evidence. Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995), citing Josi's Case, 324 Mass. 415 (1949). The judge's findings that the employee did not suffer a new injury while driving a bus after 1996, and that the activity of driving was essentially in the nature of "wear and tear," see Zerofski, supra, support the conclusion that the insurer here is liable for the claimed medical treatment. However, given the fact that the employee had suffered two prior injuries, these findings do not suffice to support that conclusion.[5] Since "[t]he interpretation of medical opinions on causal relationship is, in the first instance, for the administrative judge to determine," Donovan v. Commonwealth Gas Co., 15 Mass. Workers' Comp. Rep. 415, 417 (2001), citing Triolo v. Commonwealth of Mass., 14 Mass. Workers' Comp. Rep. 246, 251 (2000), we recommit the case for the judge to make subsidiary findings sufficient for us to determine what his view of the medical evidence was, and how he arrived at his apparent conclusion that the employee's need for treatment was causally related to the 1996 aggravation injury. Without such findings, we cannot

[5] The facts of the instant case are similar to those in Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84 (1993), where we reversed an award against the second insurer and assessed liability against the first insurer, as a matter of law, even in the face of an adopted medical opinion sufficient to establish causal relationship against the second insurer. However, the two cases are distinguishable, making a holding as a matter of law inappropriate here. In Smick, the employee had no back problems prior to the first work-related injury, left her first employment after suffering a back injury, continued to work at her concurrent employment as a van driver with increasing discomfort, and finally left her second employment due to pain. We affirmed the judge's determination that no new injury occurred while the employee worked as a van driver, and further held that, as a matter of law, her duties performed there were "simply too common and necessary to a number of occupations to constitute identifiable conditions of employment . . . ." Id. at 89; Zerofski's Case, 385 Mass. 590, 594-95 (1982). Thus, the fact that the judge gave "primary consideration" to a medical opinion sufficient to causally relate her incapacity to her driving was irrelevant. In addition, we held that "the evidence leads inescapably to the conclusion that [the employee's] incapacity . . . is causally related [to the first incident]." Smick, supra at 89. Here, Mr. Gajda, unlike Ms. Smick, had had two prior injuries and at least two surgeries to his back before the work injury in question (the 1996 injury). Thus causal relationship, as to liability for his back condition, cannot readily be established without the aid of expert testimony.

perform our appellate function.[6] See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4-5 (1993).

The insurer also argues that the judge's decision must be reversed, rather than recommitted, because the § 11A medical report offers no opinion on the reasonableness or necessity of the medical services requested by the employee. We agree with the insurer that the § 11A report is silent on this issue. We have held that, "*In most cases*, '[f]indings regarding the reasonableness of medical treatment must be based on expert medical testimony.' " Burnette v. Command Marketing Corp., 13 Mass. Workers' Comp. Rep. 56, 59 (1999)(emphasis added), quoting Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76, 77-78, citing Cook v. Somerset Nursing Home, 8 Mass. Workers' Comp. Rep. 164, 165 (1994). However, we do not believe that this is a case where expert opinion is necessarily essential. The medical services in question were a diagnostic test (an MRI); one office visit; and some pain medications. (Dec. 2.) The judge reasoned that,

> Even his light job as a bus driver increased the level of pain he felt, and he finally underwent an MRI to see if there was something more that could be discovered. *This would appear to be perfectly reasonable* for a man who had undergone this many surgeries and, after working with the pain for a few years, continued to experience significant symptoms.

(Dec. 3.) (Emphasis added.) The judge was not dealing with the reasonableness and necessity of a surgical procedure, or a course of physical therapy or pain management. Given an established work-related residual condition and the relatively routine nature of the services provided, the judge could well be within his authority to determine their reasonableness and necessity without resort to expert medical opinion. Compare Lovely's Case, 336 Mass. 512 (1957) (medical testimony on causation not necessary where lay

[6] We note that should the judge interpret the impartial opinion, even bolstered by lay testimony, as not establishing causal relationship, the employee, who did not move for additional medical evidence, would have failed to meet his burden of proof, as the insurer argues. See Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. 7, 16 (2003) (where § 11A testimony did not address appropriate causal standard put in issue by insurer, employee failed to meet her burden of proof by not moving for additional medical evidence).

person could, as a matter of general human knowledge and experience, make causal connection).

We therefore recommit this case to the administrative judge for further subsidiary findings indicating, i) whether and how, in his view, the § 11A report supports a finding of causal relationship between the 1996 work injury and the employee's need for the medical services claimed in 2000, and ii) whether the principle set out in Lovely's Case, supra, is applicable to the § 30 medical benefits claimed in this case.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: May 26, 2004